No. 3094

United States Circuit Court of Appeals

For the Ninth Circuit

DEVIL'S DEN CONSOLIDATED OIL COMPANY,
a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

MORRISON, DUNNE & BROBECK,
JOSEPH D. REDDING,
Attorneys for Defendants and Appellants.

Filed this.....day of February, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

TOWN TALK PRESS

No. 3094

United States Circuit Court of Appeals

For the Ninth Circuit

DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT

This is an appeal from an order appointing a receiver of some oil land in Kern County, California (Tr., p. 107). The property is described in the bill of complaint as the northeast quarter of section thirty in Township 26 South, Range 21 East, Mount Diablo Base and Meridian (Tr., p. 5).

The proceeding at bar is a suit in equity to quiet the title of the appellee, plaintiff below, to have it adjudged that the defendants have no title to the property, and that the lands are the perfect property of the plaintiff free and clear of the claims of defendants, and to enjoin the defendants from com-

mitting any trespass or waste upon the lands (Tr., pp. 11-12). As an incident to this ultimate relief, a receiver *pendente lite* was applied for (Tr., pp. 12-13).

Courts of equity do not entertain suits for a receivership merely. A receivership is an incident in the exercise of a principal jurisdiction; it is something ancillary. If the court is without jurisdiction to hear and determine the main subject matter, it is without power to appoint a receiver. (*Hutchinson v. American Palace Car Co.*, 104 Fed. 128; *Condon v. Mutual Life Assn.*, 89 Md. 99.)

As to the bill of complaint: (Tr., pp. 4-14.) The presidential withdrawal of public land from mineral exploration—covering an area inclusive of the land in suit—by the proclamation of September 27, 1909, is alleged in the bill. It is said that notwithstanding the withdrawal, and in violation thereof, and "long subsequent to the 27th day of September, 1909," the Devil's Den Consolidated Oil Company entered upon this land for the purpose of exploring it for oil and gas. No discovery of oil was made, it is said, until the latter part of 1910; and it is alleged that the defendant "is now extracting oil from said land, boring oil and gas wells, and otherwise *trespassing* upon said land."

It is further said that the defendants claim some title to the land, but the claim is derived directly or mediately from some pretended notice or notices

of mining location, and by conveyance, contract or lien directly or mediately from the pretended locators. None of such location notices, it is said, are valid against the plaintiff, and no rights have accrued thereunder.

The location notice is referred to with more particularity. It is said that it was filed and posted for the benefit of the company by dummy locators, who afterward conveyed the land to the company. The date of the location notice is given as February 13, 1907.

There is not one word in the bill about any proceedings in the Land Department, supervening upon this location notice or otherwise. The bill is silent about the existence of any proceedings whatever in the Land Department.

Having alleged that the defendant entered upon the land long after September 27, 1909, the bill adds redundantly that the defendants at the time of the withdrawal, were not bona fide occupants or claimants of the land in diligent prosecution of discovery work. In plain English, they are proceeded against as tresspassers, and the pretended location notice from which they assume to derive some interest, is said to be invalid, the work of mere dummies.

But the answer and the proofs reveal that this is no mere case of trespass upon public land, as was the El Doro case, 229 Fed. 946, which went off upon the sufficiency of a complaint framed very

much like the present one. The answer and the proofs reveal that this is the precise case of a mineral application now pending in the Land Department, and of which the Land Department is now in the actual exercise of jurisdiction.

The answer first joins issue on the averments of the bill (Tr., pp. 27-34). It sets up that the grantors of defendant made a valid discovery of minerals on this quarter section, and located it as a mining claim on February 13, 1907, and defendant has held and worked it for five years prior to the commencement of this suit, and is entitled to a patent under Section 2332, Revised Statutes (Tr., pp. 34-5).

It is further alleged, as a separate defense, that the court has no jurisdiction, and in this behalf, the Land Office proceedings are set forth. The answer alleges the location of the northeast quarter of section thirty, the recordation of the notice of location, and the assignment by the locators to the Devil's Den Consolidated Oil Company (Tr., pp. 36-7). It alleges the occupancy of the property, the assessment work, the discovery of gypsum, the drilling for oil, and the discovery of a producing well of some three hundred barrels per day, the expenditure of five hundred dollars in developing the gypsum, and of three thousand dollars and over in developing the oil.

The application for patent will not be found in the transcript of the present case, No. 3094. It will

be found in the consolidated statement on appeal, applicable as well to this case as to the Lost Hills cases, and printed in the transcript of No. 3095. The patent application in the present case is set forth at pages 503 *et seq.*, transcript in 3095, and recites that the Devil's Den Consolidated Company and its predecessors in title "have, ever since the location of said placer mining claim, to wit: February 13, 1907, been in the actual bona fide possession of said land, working and holding and claiming the same as a placer mineral claim, and developing the placer minerals therein contained under the mining laws of the United States."

Now, then, the answer in the present case alleges that on August 2, 1911, the Devil's Den Company filed this application for patent in the United States Land Office at Visalia "wherein and whereby it did apply to the United States of America and to the General Land Department thereof, in accordance with the requirements of law, for a patent to said northeast quarter" (Tr., 3094, pp. 38-9).

The statutory proceedings and requirements in the way of a showing to the Land Office, and of supporting affidavits, are set forth with particularity (Tr., pp. 39-41). The publication and posting of notice, and the proofs in that behalf, are made to appear (Tr., pp. 41-2). The payment of the purchase price, the issuance of the receiver's receipt, and the forwarding of a duplicate receipt, with the

record in the matter of such application, to the General Land Office, and the pendency of the proceedings therein ever since,—all this is alleged (Tr., pp. 43-4).

It further appears that on September 2, 1915, the defendant was notified that a special agent of the United States Land Office had filed charges against the validity of this application entry; that the company has joined issue upon the charges; that no decision has been made, as yet, by the Commissioner or the Secretary, and the application is pending and undisposed of (Tr., p. 44). These charges go upon the very thing alleged against the entry in the bill, namely: that the applicant was not in diligent prosecution of work leading to discovery of oil or gas at the date of the withdrawal (Tr., pp. 46-7; p. 8). There is no reference in the bill of complaint to gypsum. The answer alleges, as well a discovery of gypsum as of oil—in this respect following the application for patent. The charges in the Land Department go also to the matter of gypsum, and allege that the claim of a gypsum discovery is a subterfuge for obtaining title to valuable oil land (Tr., p. 47). The charge made in the bill of complaint as to the dummy character of the location, is duplicated in the charges filed in the Land Office (Tr., pp. 47-8).

In a word, the Land Department now has before it, and upon issues regularly joined for trial, the

very matters upon which this bill depends, namely: our diligent prosecution of work leading to the discovery of oil, and the *bona fides* of the original location; and an additional question, not raised by the bill, touching the sufficiency of this gypsum discovery. There are two proceedings, parallel and concurrent, going on *pari passu*, the proceeding now before the court on this bill and answer, and the proceeding pending and at issue in the Land Department, in both of which the same questions are up for trial, and in both of which the ultimate relief is the decision, one way or the other, on the matter of the title to the property. Can such things be? Has the jurisdiction been committed to both tribunals? Is it a race of diligence, seemly or unseemly, for the first and faster determination? This is one of the questions presented by this record.

If the jurisdiction should be held to be in the Land Department, then the court is without that primary jurisdiction to which is drawn and upon which is rested, its auxiliary and incidental jurisdiction to appoint a receiver. Judge Bean held that he had this primary jurisdiction, with its incidental power to appoint a receiver. But he went on to say, that if he was wrong about that, he would be authorized to appoint a receiver pending the determination of the proceedings in the Land Department. His thought was, that the Land Department had no equity powers of injunction or re-

ceivership, and that the court would be justified, as an incident and an aid to the jurisdiction of the Department, in appointing a receiver pending a determination by the Department. The conclusive answer, it is believed, is, that the bill in this case is not framed on any such theory.

ASSIGNMENT OF ERROR

The assignments of error are really gathered up in the two questions which have just been suggested: First, did the court have jurisdiction to adjudicate the title to the property, while that very question was pending in the Land Department on an application for patent? And, second, did the court have jurisdiction to appoint a receiver, in aid of the proceedings in the Land Department, upon a bill framed like the bill in the present case? We proceed at once to the argument of these questions:

ARGUMENT:

I.

The court had no general or primary jurisdiction to adjudicate the title to this property, while that very question was pending in the Land Department on an application for patent.

It is conceded by Judge Bean that if this were a contest between private parties, the payment of the purchase price would vest the equitable title

in the applicant, with a *prima facie* right to a patent. He says:

> "In a contest between private parties over the title or right to the possession of mining property for which patent has not been issued, the doctrine invoked would no doubt be applicable."

He is referring to the doctrine that the payment of the purchase price "was in effect a judgment *in rem*, and vested the equitable title to the land in the defendants, subject only to the appellate jurisdiction of the land department." He goes on:

> "Where the necessary steps are taken by a qualified applicant to obtain a patent to mining land, and no adverse claim has been filed, the applicant becomes vested with the equitable title and a *prima facie* right to a patent immediately upon the payment of the purchase price, and the delay of the Department in issuing patent does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." He cites *Benson Mining Company v. Alta Mining Company*, 145 U. S. 428; also the case of *El Paso Brick Company v. McKnight*, 233 U. S. 250, referred to by this court in its recent opinion in *Consolidated Mutual Oil Co. v. United States*, No. 2787.

> "But," continues Judge Bean, "such a proceeding does not divest the government of its title, nor is it an adjudication as between the claimant and the government." (Decision below, 236 Fed., p. 975.)

It is believed, with deference, that the learned judge fell into error. The proceeding does, it is submitted, divest the government of the equitable title, subject always, until patent issues, to the unspent jurisdiction of the Department by appellate proceedings within the Department itself, to reexamine, and, if need be, to annul the entry. The very case cited by Judge Bean, *Benson Mining Company v. Alta Mining Company*, 145 U. S. 428, is clear to the point.

> "The equitable title," says Mr. Justice Brewer in that case, "accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

And, further:

> "It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

And again:

> "There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him."

Or, as was said by the Supreme Court of Wisconsin in *Cornelius v. Kessel*, 16 N. W. 550:

> "The learned counsel for the plaintiff insisted there was a distinction between the case where the purchaser obtains the Register's final certificate, and where he merely holds the Receiver's receipt. But both instruments stand upon the same footing. *The purchaser's rights are founded on the contract of purchase and payment of money*, and the statutes of this State have always given the same effect to both instruments as evidence of title, and there is no earthly reason that we perceive for making a distinction between them, so far as the rights of the purchaser are concerned."

Cornelius v. Kessel went to the Supreme Court of the United States, 128 U. S. 456. The jurisdiction of the Land Department, by appellate proceedings, to correct and annual entries of land allowed in the first instance by the Register and Receiver—precisely the jurisdiction now in exercise, in the case at bar, upon charges formally preferred—is fully sustained. It is said, at page 461 of the opinion:

"The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, *undoubtedly authorizes him to correct and annul entries of land allowed by them*, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such *entry and payment* the purchaser secures a *vested interest* in the property *and a right to a patent* therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property."

If the government is not, as Judge Bean has put it, an adverse party, it is something very much more—it is a voluntary party, a vendor of real estate who retains the legal title as a trustee for the vendee in whom has been vested, by voluntary action of the vendor, the equitable title and estate.

In *Cosmos Exploration Co. v. Grey Eagle Oil Co.*,

104 Fed., p. 40, it appeared from the bills of complaint—as it appears here from the answer and proofs below—that the entries in question were being contested, "and that those contests are still pending in the Land Department." Said Judge Ross:

> "No court can lawfully anticipate what the decision of the Land Department may be in respect to the contest, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact, such as is that relating to the character of any particular piece of land."

And in *Marquez v. Frisbie*, 101 U. S. p. 475, the court said:

> "That principle is, that the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal *within* that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title *afterwards* comes in question. But in this class of cases, as in all others, there exists in the courts of equity, the jurisdiction to correct mistakes, to relieve against and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belong to another, to give appropriate relief."

Citing *Moore v. Robbins*, 96 U. S. 530, *Shepley v. Cowan*, 91 U. S. 330, and *Johnson v. Towsley*,

13 Wall., 72—all three of them were cases where the patent had issued, the jurisdiction of the Department had been spent, and thereupon the jurisdiction of the courts attached.

As Mr. Justice Brewer aptly expressed it, in speaking of canceled entries of timber lands:

> "The statute provides that if an entry is wrongfully made it may, *prior to patent*, be set aside by the Land Department, the entryman forfeiting the money which he has paid. In other words, *by the action of the department, the equitable title is canceled and restored to the government.*" (*U. S. v. Detroit Lumber Co.*, 200 U. S. p. 339.)

> "It is clear," said the Supreme Court of the United States in *U. S. v. Schurz*, 102 U. S. 401, "that the right and the duty of deciding all such questions belong to those officers (of the Land Department), and the statutes have provided for *original* and *appellate* hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction."

Here, then, is a case in which the entry had been made, the purchase price paid, the receiver's receipt issued, and the equitable title vested. That equitable title was questioned by charges preferred within the Department, presenting questions peculiarly of departmental cognizance—the question of the diligent prosecution of work leading to the discovery of oil, as of the date of the presidential

withdrawal; and the question of the *bona fides* of the location. It was these questions precisely upon which the bill of complaint is made to turn. The two controversies, investigating the same questions, are going on concurrently; indeed, the controversy is not only depending as well in the Land Department as in the court, but issues have been made up, and the case is ready for trial before the Department. As Judge Ross said in *Cosmos Exploration Co. v. Grey Eagle Oil Co., supra,* "no court can lawfully anticipate what the decision of the land department may be in respect to the contest, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact."

Judge Bean, it is true, in the opinion below, refers to some decisions of the Supreme Court. But they are all cases in which the patent had issued, the jurisdiction of the Department had been exercised and exhausted. He cites no case where the Department, on an appellate proceeding within the Department, is exercising its jurisdiction to review and annul an entry allowed, in the first instance, by the local land office, and where at the same time the jurisdiction of a court has been sustained, prior to patent, to review and annual that same entry upon a consideration of the precise question which the Department is hearing and determining. No

such case, it is believed, could be cited, for no such decision can be found.

It is submitted, therefore, that the court below had no general or primary jurisdiction to adjudicate the title to this property, while that very question was being heard and determined in the Land Department on an application for patent. So far, then, as the order appointing a receiver is to be sustained as an incident to a general or primary jurisdiction which does not exist, it must fail.

II.

The bill in this case was not framed to invoke the aid of the court in protecting the property pending final disposition of the patent application by the Land Department—it ignores the proceedings in the Department—and it does not afford a basis for the appointment, in that view, of a receiver.

It is said by Judge Bean, in his opinion below:

> "If, however, I am mistaken as to the extent of the jurisdiction, the government is clearly entitled, upon the allegations of the bill and the showing made, to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department."

He then calls attention to the government's claim that the discovery of gypsum was merely a subterfuge, and that there was an accommodation loca-

tion. He makes no finding as to whether the government has sustained these charges by a preponderance of evidence—indeed, he declines to express an opinion upon it and will only go so far as to say that there is substantial ground for the government's position. The opinion does not go into the question as to whether the company had a status, within the Pickett Act, in respect to its exploration and discovery of oil.

Now, the bill in this case does not ask for any protective relief—for an injunction or a receiver —until the decision of the Land Department upon the matters pending therein. It ignores those proceedings. As we have already pointed out, it impugns the *bona fides* of the location, alleges in paragraph IV (Tr., p. 6) that the company entered upon the land "long subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas," describes the company as a trespasser (Tr., p. 7), and prays that the defendants be enjoined from committing any trespass or waste upon the land (Tr., p. 12).

Not a word beyond the imputation as to the *bona fides* of the location; not a word beyond a trespass alleged to have begun "long subsequent to the 27th day of September, 1909." Not a syllable about any application for patent, or about the notice thereof, or the payment of the purchase price, or the issuance of the receiver's receipt; not a syllable about

the pendency of these very charges, or of any proceeding whatever, in the Land Department. Those proceedings are ignored.

In *Cosmos Co. v. Grey Eagle Co.*, 190 U. S. 302, the question of title, depending though it was, as here, in the Land Department, was brought into the federal court, on the equity side, for adjudication and determination; and as incidental to the general jurisdiction thus ascribed to the court, an injunction and receiver were asked for. The Supreme Court, at the threshold of its opinion, (p. 308) observes:

> "The court is therefore called upon, in advance of and without reference to the action of the land department, to determine complainant's right and title to the three-quarters interest in the selected land, and a final decree is asked determining the interest of the parties in this land, *while the question in relation to title is still properly before the land department and not yet decided.* This we cannot do."

And further (p. 308):

> "An examination of the complainant's bill shows that it does not ask for an injunction *until the decision of the land department upon the matters pending therein. The complainant ignores those proceedings*, so far as to claim now the final adjudication by the court based upon its alleged equitable title to a three-quarters interest in the land selected."

And again (p. 315):

> "The bill is not based upon any alleged

> power of the courts to prevent the taking out of mineral from the land, *pending the decision of the land department upon the rights of complainant*, and the court has not been asked by any averments in the bill or in the prayer for relief to consider *that question.*"

Indeed, Judge Bean himself in one of his more recent decisions (*U. S. v. Record Oil Co., et al.*, No. A-41), in dismissing a bill, remarked:

> "It is claimed, also, that in any event the plaintiff is entitled to invoke the aid of a court of equity to protect the property from waste and destruction pending final disposition of the patent application by the land department. But *the bills* are not framed on that theory, and *contain no allegation* upon which such a decree could be based."

It is now, therefore, respectfully submitted that the order appointing a receiver should be reversed.

MORRISON, DUNNE & BROBECK,

JOSEPH D. REDDING,

Attorneys for Defendant and Appellant.